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In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 223.

UNITED STATES OF AMERICA, et al.,
Appellants,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, et al.,
Appellees.

ON APPEAL FROM
THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

BRIEF FOR THE RAILROADS.

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OPINIONS BELOW.

The report of the Interstate Commerce Commission (R. 28-50) is reported in 266 I. C. C. 55. The opinion of the District Court (R. 148-152) is reported in 71 F. Supp. 499.

JURISDICTION.

The final judgment of the three-judge district court (R. 190-191) was entered on May 14, 1947. The petition for appeal was presented and allowed on July 11, 1947 (R. 191-192). Jurisdiction of this Court is invoked under Sections 210 and 238 of the Judicial Code, as amended. 28 U. S. C. 47a, 345. Probable jurisdiction was noted on October 13, 1947 (H. 619).

STATUTE INVOLVED.

Relevant provisions of the Interstate Commerce Act (49 U. S. C. 1, *et seq.*) are copied in the Appendix.

QUESTION PRESENTED.

Whether the Interstate Commerce Commission has constitutional and statutory authority by order to require a railroad to make deliveries of carload shipments of livestock to a shipper on the shipper's private side track where compliance with that order will require the railroad either (1) to acquire a right of way and construct a track from its line of railroad to the shipper's private side track or, (2) to use a side track owned by another shipper whose contract with the railroad precludes use of that shipper's side track for the purpose of making such deliveries.

STATEMENT.

This case grows out of an attempt by Swift¹ to obtain delivery of livestock direct to its private side track from New York Central's main line (and hence the lines of the other Railroads) in one of two ways: by forcing the Stock Yards to make its intervening private side track available; or by compelling the New York Central either to exercise a right, which it did not possess, to use the Stock Yards' private side track, or to build a track from its

¹ For convenience the following abbreviations have been used in this brief: Swift refers to Swift and Company and any predecessors in interest. New York Central refers to The New York Central Railroad Company and any predecessors in interest. Railroads refer to The New York Central Railroad Company, The Pennsylvania Railroad Company, The Erie Railroad Company, The Wheeling and Lake Erie Railroad Company, and The Baltimore and Ohio Railroad Company. Stock Yards refers to The Cleveland Union Stock Yards Company. Commission refers to the Interstate Commerce Commission. Act refers to the Interstate Commerce Act. The New York, Chicago and St. Louis Railroad Company was a defendant before the Interstate Commerce Commission but was not a party to the suit in the District Court.

main line and acquire right of way therefor in order to connect with Swift's private side track. To achieve that result, Swift complained to the Commission, making the Railroads defendants by virtue of their status as common carriers and the Stock Yards by virtue of the supposed authority of Section 2 of the Elkins Act (49 U. S. C. 42). The Commission did not make any findings concerning the status of the Stock Yards, the nature of its business or the services it rendered. The Commission assumed jurisdiction of the Stock Yards and made an order against it on the sole ground that Section 2 of the Elkins Act authorized the Commission's action (R. 29). For the purposes of this case, therefore, the Stock Yards has no status different from the status of any private industry.

The statement of facts in the appellants' brief is correct as far as it goes. But it wholly fails to set forth additional facts which were found by the Commission. The full facts eloquently present the background and nature of this controversy and one of the reasons why three members of the Commission dissented from the Commission's report which was contrary to the examiners' recommendations. R. 28, 45, 49. To place these additional facts in their proper setting, some repetition is necessary.

Track 1619 was constructed in 1899, wholly on the land of the Stock Yards and at its expense, pursuant to a conventional private side track agreement which gave New York Central the right to use the track so long as the use did not interfere with the business of the Stock Yards. R. 30, 347. Ownership of the track was expressly vested in the Stock Yards. R. 348. The agreement was terminable by the New York Central on sixty days' notice. R. 30, 349.

In 1924, a new private side track agreement was executed by the Stock Yards and the New York Central. This agreement confirmed the Stock Yards' ownership of the track, gave the New York Central the right to use it, and provided for maintenance by the New York Central. R. 30,

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340-341. This agreement was terminable by either party on thirty days' notice. R. 30, 341. In December, 1934, the Stock Yards exercised its option to terminate the 1924 agreement. R. 423-424. Thereafter, the Stock Yards demanded that the 1924 private side track agreement be amended so as to deny New York Central the right to use the Stock Yards' private side track for competitive traffic, a charge for which use was to be the subject of a separate agreement. R. 31, 339. The parties construed "competitive traffic" to mean livestock. R. 31.

Prior to 1910, Swift did not have access to New York Central's main line. In 1907, Swift and other nearby industries sought to obtain their own direct connection with New York Central's main line by a spur running directly to their property. R. 31. Swift obtained the necessary municipal ordinance and induced New York Central to condemn the right of way to make construction of the spur possible. R. 31, 344. Swift then determined that the cost of the track and land would be greater than it was willing to bear and abandoned the plan. R. 31, 344-345. If Swift had consummated its plan there would have been no occasion to use the Stock Yards' private side track. R. 31.

In 1910, with full knowledge of the Stock Yards' ownership and control of its private side track, Swift apparently concluded to take advantage of the Stock Yards' private side track and commenced negotiations to that end. R. 31, 184. At the request of Swift, the New York Central agreed to build the track required to connect the Stock Yards' private side track with Swift's proposed private side track, if Swift obtained the necessary right of way. R. 345. Swift procured the requisite municipal ordinance granting a permit to construct a side track at grade across a city street (which permit may be cancelled at will by the city), obtained easements for the right of way, including a small parcel of land owned by the Stock Yards, and caused the easements to be conveyed to New York Central. R. 31,

345. The additional tracks were then built and connection was made to the Stock Yards' private side track. Conventional private side track agreements were executed from time to time by Swift and the New York Central covering Swift's private side track and subsequent extensions. R. 32. Each agreement permitted use by New York Central which did not interfere with Swift's business. Each agreement was terminable by either party on thirty or sixty days' notice. R. 32.

From 1916 to 1936, Swift owned 6.5 per cent of the outstanding shares of stock of the Stock Yards, and its Cleveland plant managers served on the Board of Directors of the Stock Yards. R. 34, 442. During part of this time, representatives of the Stock Yards and Swift served on a traffic and transportation committee for the Stock Yards district. R. 34. In 1936, Swift divested itself of ownership in the Stock Yards pursuant to a court order rendered in 1931. R. 34.

From 1910 to 1930, Swift accepted delivery of livestock at the Stock Yards. R. 34. It sought to have deliveries made direct to its side track only after the Stock Yards proposed to make charges for services which the Stock Yards had theretofore rendered without charge. R. 34. This was about the same time that Swift had been ordered by the court to divest itself of ownership in the Stock Yards. Swift has only limited, actually inadequate, facilities for unloading carload shipments of livestock. R. 32. Since 1935, when the Stock Yards withheld use by the Railroads of its private side track for deliveries of livestock, the Railroads have not delivered livestock to Swift's side track but have made delivery at the Stock Yards. R. 32-33.

The Commission determined that the Railroads had subjected Swift to undue prejudice, had been guilty of an unreasonable practice, and had failed to operate a switch connection, all in violation of the Interstate Commerce Act.

49 U. S. C. 1(6), 1(9), 3(1). Its order, addressed to the Railroads and the Stock Yards, directed them to refrain from refusing to deliver livestock to Swift's private side track and to prepare and maintain schedules providing for such deliveries. R. 65-66. It was enforcement of this order which the District Court enjoined. R. 190.

SUMMARY OF ARGUMENT.

The inescapable effect of the Commission's order requiring the Railroads to make deliveries of livestock to Swift's private side track is to compel the Railroads to do one of two things: (1) to acquire a right of way and construct a track from the main line of the New York Central to Swift's private side track; or (2) to compel them to use the private side track of the Stock Yards. The Commission is without constitutional or statutory authority to require the Railroads to do either one of these things.

I. The Railroads cannot be compelled to construct a track to Swift's private side track. The provisions of the Interstate Commerce Act do not confer any authority upon the Commission directly or indirectly to compel a railroad to acquire a right of way and construct a track from its main line to reach a private industry. The decisions of this Court and of the Commission establish that a shipper desiring access to the main line of a railroad has the duty of acquiring a right of way and building a side track to the property line of the railroad's right of way. The performance of this duty is a condition precedent to any obligation on the part of the railroad to provide a connection to its main line.

II. The Commission cannot compel the Railroads to use the Stock Yards' private side track. The Commission intended and its order requires, in effect, that the Railroads make deliveries of livestock to Swift over the Stock Yards' private side track.

A. But the Commission has no power to compel the Stock Yards' private side track to be devoted to public use for the delivery of livestock unless by act of the Stock Yards the side track has been so devoted. The Stock Yards must be treated as a private industry and its side track must be regarded as the side track of a private industry. The Commission has no constitutional or statutory authority to compel a private industry against its will to permit use by a railroad of its private property. Nothing in Sections 1(3)(a), 1(6), 1(9) or 3(1) of the Act purports to give the Commission any such authority, and the Constitution forbids it. Hence, the Commission was without power to require the Stock Yards to devote its private side track to public use for the delivery of livestock by the Railroads unless the Stock Yards had by its own act devoted its side track to such use or was estopped to deny that it had done so.

B. The Stock Yards has not devoted its side track to public use for the delivery of livestock. During the entire existence of the side track, the Stock Yards has at all times retained ownership and control of the side track, and has permitted use of the side track only pursuant to revocable side track agreements with the New York Central. Even if the side track had been devoted to unrestricted public use prior to 1935, the Stock Yards was free thereafter to withhold all use of the side track or to withhold its use for the delivery of livestock. A common carrier may hold itself out to the public as being a carrier of specified articles only. The right of a private industry to limit the extent to which its private property is devoted to public use cannot be less than the right of a common carrier to limit the extent to which it serves the public.

C. Section 2 of the Elkins Act does not enlarge the constitutional or statutory authority of the Commission. This section carries its own refutation of any contention that it was intended to enlarge the definition of "railroad"

in Section 1(3)(a), the prohibitions of Section 1(6) and 3(1), or the duties imposed on the Railroads by Section 1(9) of the Interstate Commerce Act.

III. The Commission failed to make basic or essential findings required by the Act to support its order. Moreover, it failed to dispose of important issues presented to it in the course of its proceeding, and rendered an order which is wholly inadequate. Essentially this case involves a controversy between Swift and the Stock Yards which the Commission attempted to adjudicate by directing an order against the Railroads. Confronted with the private side track agreement between the Stock Yards and the New York Central, the Commission improvised a basis of jurisdiction and on that basis rested its conclusion that the Railroads had been guilty of undue prejudice, an unreasonable practice, and failure to operate a switch connection in violation of Sections 3(1), 1(6) and 1(9) of the Act.

A. The Commission failed to make the basic or essential findings required by the Act to support its order. To establish violations of these sections, the Commission was required to do more than merely express its findings in the words of the Act. Before the Commission could find that failure of the Railroads to deliver livestock to Swift's private side track over the side track of the Stock Yards constituted an *unreasonable* practice, an *undue* prejudice to Swift or an *undue* preference to Swift's competitors, and before the Commission could find that the Railroads could operate the switch connection upon *reasonable* terms and that such operation would provide the Railroads *reasonable* compensation, the Commission was required to find the cost to the Railroads of making such deliveries. In failing to make this finding, the Commission omitted to find the quasi-jurisdictional facts necessary to sustain its order.

B. The Commission failed to dispose of important issues presented in the course of the proceeding and rendered a wholly inadequate order. The Commission failed

to decide a number of vital questions, including the question whether or not the Stock Yards are free to terminate the side track agreement and prevent the Railroads from complying with the Commission's order, and the question whether or not the Railroads must pay for use of the Stock Yards' private side track and if so, upon what basis. The Commission has, therefore, made a report and order which provide a formula for confusion.

ARGUMENT.

The correctness of the judgment of the District Court depends upon the validity of the Commission's order. The validity of that order depends, in turn, upon the authority of the Commission to make it. If the Commission's order exceeded its constitutional or statutory authority, then the District Court was correct in enjoining enforcement of the order and its judgment must be affirmed.

The Railroads have consistently expressed their willingness to deliver livestock to Swift's private side track if Swift will make satisfactory arrangements with the Stock Yards for the use by the New York Central of Track 1619, or if Swift will conform to Section 1(9) of the Interstate Commerce Act and construct its private side track to the New York Central's main line. The Railroads would be entirely willing to make such deliveries to Swift as required by the Commission's order if the order were within the Commission's constitutional and statutory authority, and constituted a complete disposition of the proceeding before the Commission. But the Railroads are unable to find the requisite authority for the Commission's order and therefore have no alternative but to resist it because of the dilemma facing them: either possible heavy penalties as a result of violation of the order, or possible liability under State law as a result of invasion of private property rights in compliance with the order.

The manner in which the Commission exceeded its authority can be more clearly grasped from an analysis of

precisely what it ordered and what that order involves. In effect, the Commission has ordered the Railroads to make deliveries of livestock directly to Swift's private siding. This the Railroads can do in only one of two ways: by construction of a track from the New York Central's main line to Swift's private siding; or by making the deliveries over Track 1619, which is not owned by New York Central and over which it has only limited rights. The Railroads will show in succeeding pages that the Commission was without authority directly or indirectly to require the Railroads to do either one of these things, either one of which would compel the Railroads to confer upon Swift an undue preference and advantage as compared to other shippers.

I. THE RAILROADS CANNOT BE COMPELLED TO CONSTRUCT A TRACK TO SWIFT'S PRIVATE SIDE TRACK.

The Commission's order cannot be sustained on the ground that the Railroads can comply with it by resorting to the first alternative, construction of a track from the New York Central's right of way to Swift's private sidetrack. Viewed in this light, the order would clearly exceed the Commission's statutory authority and, in fact, would be in direct conflict with the plain provisions of the Interstate Commerce Act and decisions construing it. Section 1(21) of the Act confers limited authority upon the Commission to require a railroad to provide adequate facilities or to extend its lines, but only after the Commission has made findings which it did not make in this case. Section 1(22) of the Act expressly provides that the authority conferred by Section 1(21) "shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State 49 U. S. C. 1(22).

Section 1(9) of the Act is equally explicit in the authority which it gives to the Commission and the duties

which it imposes on a railroad.* Thus it provides that any common carrier subject to the Act "upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad ***" 49 U. S. C. 1(9). In the words of this Court, Section 1(9) "limited the railroad's obligation to the building of the switch connection, leaving the burden of building the side track upon the shipper *** and the railroad cannot be ordered to build the switch until after the shipper has built the private siding." *Cleveland, etc. Railway Co. v. United States*, 275 U. S. 404, 413.

Nor can an order of the Commission which, in effect, requires the Railroads to build a track to Swift's side track be sustained merely because the Commission has authority to find and remedy alleged violations of Sections 1(6), 1(9) or 3(1) of the Act. Violations of the Act are not to be found and remedied in a ~~vacuum~~ or in the abstract. The Commission's authority to determine complaints and issue orders is measured by the statute which is its sole authority to act at all. The Commission has no authority directly to order the Railroads to acquire a right of way and construct a track to Swift's private side track. Indirect authority to require the same thing cannot be drawn from the authority

* "There is no duty on the part of a common carrier subject to the act to provide tracks off its lands to effect connection with an industry. If an industry desires connection with a trunk line, the duty devolves upon it to make arrangements for the procuring of a spur. Paragraph 9 of section 1 makes it the duty of a common carrier under stated circumstances to construct, maintain, and operate, upon reasonable terms, switch connections with private sidetracks which may be constructed to connect with its rails by shippers tendering interstate commerce. But this duty does not arise until the shipper has provided the sidetrack." *Certain-Teed Products Corporation v. Chicago, etc. Railway Company*, 68 I. C. C. 260, 263.

of the Commission to find and remedy alleged violations of Section 1(6), 1(9) or 3(1) of the Act in the conduct of operations over the existing tracks.²

For the same reasons, the Commission's order cannot be supported with the appellants' startling proposition that it was authorized because Swift's private side track was physically connected to the otherwise isolated 793 feet of track owned by the New York Central and lying between Swift's private side track and the private side track of the Stock Yards. This isolated piece of track, except as the Railroads have the right to reach it over the Stock Yards' private side track, is not a part of the New York Central's railroad, but is merely so much steel and so many ties. Hence, the appellants' proposition involves either the assumption that the Commission has authority to compel the Railroads to construct a track from the New York Central's main line to this 793 feet of rails and ties, or else the assumption that the Commission can require the Railroads to utilize the Stock Yards' private side track in reaching Swift's side track.

The first assumption is clearly untenable for the reasons just stated. The assumption that the Commission can require the Railroads to use the Stock Yards' private side track over which they have only limited rights is shown, in Part II of this brief, to be equally untenable.

² "Section 1(9) does not authorize us to require a railroad to construct and operate a switch connection with a private sidetrack unless and until that track had been constructed, *Cleveland, C. & St. L. Ry. Co. v. United States*, 275 U. S. 404. It logically follows that a railroad may not be compelled to operate a switch connection unless the private sidetrack, although previously constructed, is in fact available for use. Common-carrier services over private sidings and private industrial tracks cannot be expected, and certainly cannot be compelled, where obstructions against the use thereof, either legal or physical, not caused by a carrier, prevents it from entering upon those tracks. Nor is it within our jurisdiction to order a carrier, or any other party, to take steps to remove such obstructions." *Limits Industrial Building Corp. v. Baltimore, etc. Railroad Company*, 258 I. C. C. 438, 441. See also: *Skoll Bros. v. Peoria, etc. Railway Co.*, 276 Ill. 267; *Alabama Central Railroad Co. v. Public Service Commission*, 200 Ala. 536.

It is therefore apparent that the Commission's order cannot be sustained on the ground that the Commission has authority directly or indirectly to compel the Railroads to construct a track from the New York Central's main line to Swift's private side track. In fact, nothing in the Commission's order or report indicates that the Commission thought it could base its order on that ground. It is quite clear from the report that the Commission expected the Railroads to use the Stock Yards' private side track in complying with the order, and that the Commission issued the order on the assumption it had authority to require just that. But this assumption, in the Railroads' view, presupposes the existence of authority which is not given to the Commission by the statute and is denied by the Constitution.

II. THE COMMISSION CANNOT COMPEL THE RAILROADS TO USE THE STOCK YARDS' PRIVATE SIDE TRACK.

In practical effect, the Commission's order compels the Railroads to deliver livestock to Swift over the Stock Yards' private side track. This it could require only on one of two assumptions: that the Commission has the power to compel a private "non carrier" industry to devote its privately owned side track to public use for the delivery of livestock; or that the Stock Yards has, by its own act, devoted its side track to public use for the delivery of stock. In the Railroads' view, both of these assumptions are untenable.

A. The Commission Has No Power To Require That The Stock Yards' Private Side Track Be Devoted To Public Use For The Delivery of Live Stock Unless By Act of The Stock Yards The Side Track Has Been So Devoted.

The Stock Yards was not brought before the Commission or included in the Commission's order as a common carrier. R. 29. Jurisdiction of the Stock Yards and authority of the Commission to make an order against it were

grounded solely on Section 2 of the Elkins Act, 49 U. S. C. 42. For the purpose of this case, therefore, the Stock Yards and its private side track must be regarded no differently than would be the case if all other facts were the same but the side track were owned by any private industry.

In these circumstances, an attempt by the Commission to compel the Stock Yards against its will to permit use by the Railroads of its private sidetrack would, as the Railroads have always considered, constitute a taking of private property without due process of law. The Railroads know of no Constitutional or statutory authority, and the appellants point to none, which would empower the Commission to require the Stock Yards to devote its private side track to public use. As this Court observed on another occasion: "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the State could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation; which no State can do consistently with the due process of law clause of the Fourteenth Amendment." *Producers Transportation Co. v. Railroad Commission*, 251 U. S. 228, 230-231; see also *Louisville, etc. Railroad Co. v. West Coast Naval Stores Co.*, 198 U. S. 483. Nor does the fact that the Stock Yards may have permitted the use of its private side track for the public transportation of limited categories of freight, whether by agreement between the Stock Yards and the New York Central or otherwise, invest the Commission with power to compel the use of this private track for the public transportation of other and additional categories of freight, e.g., livestock. See *State v. Rosenstein*, 217 Iowa, 985 and cases cited *infra*.

Sections 1(3)(a), 1(6), 1(9) and 3(1) of the Act do not purport to give the Commission any such authority. They would be unconstitutional to the extent that they did. Section 1(3)(a) merely provides, in part that the term railroad "shall include . . . all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein . . ." 49 U. S. C. 1(3)(a). The other sections, Sections 1(6), 1(9) and 3(1), merely impose prescribed duties on common carriers, the violation of which the Commission is empowered by Section 15 of the Act to remedy by appropriate order.

But nothing in the text of these sections or in their legislative history states or implies that in enacting them Congress intended to empower the Commission, directly or indirectly under the guise of regulating common carriers in the performance of their functions, to compel a private industry to devote its private property to a public use, or to compel that industry to permit unrestricted use of its property merely because by agreement it had permitted restricted use. In any event, these sections must be construed in the light of the limitations imposed by the due process clause of the Fifth Amendment to the Constitution.

In consequence, the Commission had neither constitutional nor statutory authority to compel the Stock Yards to permit use of its private side track by the Railroads, nor could it compel the Railroads to make deliveries of live-stock to Swift over the Stock Yards' private side track, unless the Stock Yards had by its own act devoted its side track to a public use or was estopped to deny that it had done so. In view of the Constitutional and statutory limitations on the Commission's power, it must be assumed

that the Commission grounded its order against the Railroads on the supposition that the Stock Yards had by its own act devoted its side track to a public use for the delivery of livestock, or was estopped to deny that it had, and that the side track was therefore within the definition of "railroad" in Section 1(3)(a) of the Act.

B. The Stock Yards Has Not Devoted Its Side Track to Public Use for the Delivery of Livestock.

The District Court made the following findings⁴ which are neither denied by the appellants nor controverted in the report of the Commission: that at all times the Stock Yards consistently, constantly, and notoriously, by written contract, asserted and reserved complete ownership and control over the use of its track, subject to such temporary and limited right of use as it chose to grant; that every shipper serving or being served by the use of this track has had full knowledge of the Stock Yards' ownership and control of that track; that Swift and the other plants served in the past by the New York Central over the Stock Yards' side track were served with the consent of the Stock Yards; that no one has been led to act to his harm by any sufferance or acquiescence by the Stock Yards in the use permitted of its track; and that there is no evidence that the Stock Yards has ever acquiesced in any use of its side track by the Railroads or by Swift except under the provisions of a side track agreement. R. 184.

The District Court therefore concluded that "entrance upon the land of the Stock Yards and the use of its track

⁴ The importance of the District Court's findings with respect to the question whether or not the side track was part of the New York Central's "railroad" cannot be overemphasized. Compare *United States v. Idaho*, 298 U. S. 105, 109: "• * * whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or a state commission."

were not by sufferance, but, from beginning to the end, under the provisions of a written contract, expressly asserting ownership and reserving therein the property right of Stock Yards, limiting the character of shipments, and made mutually terminable upon 30- and 60-day notice, respectively, all of which were well understood by Swift & Company, as well as by the Railroad." R. 184. Compare *Roberts v. Northern Pacific Railroad Co.*, 158 U. S. 1; *Northern Pacific Railroad Co. v. Smith*, 171 U. S. 260.

The Railroads had no rights to use the Stock Yards' private side track except the rights conferred on the New York Central by the side track agreement executed in 1935. In the absence of that agreement, the Railroads had no rights at all. If the facts be examined as they were, in 1935 just after the Stock Yards exercised its option to terminate the side track agreement, the nature of the Railroads' rights then and now becomes more clearly apparent. After the notice of termination and prior to the new agreement, Swift was receiving deliveries of any commodity on borrowed time. In the absence of a new agreement, the Railroads' right to use the Stock Yards' side track would have ended and so would Swift's access to the New York Central's main line over that track. Under Ohio law, the Stock Yards could have terminated the agreement even in the absence of the termination clause and even though the interest of another shipper was involved. *Rodefer v. Pittsburgh, etc. Railroad Co.*, 72 Oh. St. 272; see also *Yeager v. Tuning*, 79 Oh. St. 121, *Mueller v. Cincinnati Traction Co.*, 19 Oh. Dec. 504. For that matter, the New York Central apparently could have abandoned it. *Toledo v. Public Utilities Commission*, 135 Oh. St. 57.

Then and now, the only right of use the Railroads could have was fixed by the terms of whatever side track agreement the New York Central could negotiate with the Stock Yards. To the extent that the Stock Yards permitted use of its private side track, the Railroads could,

of course, use it to make deliveries. It may be assumed that *within the limits of that use* the Railroads were obligated to comply with the duties imposed upon them by the Interstate Commerce Act, and could be compelled by the Commission, for example, to render nondiscriminatory service. Compare *Baltimore etc. Live Stock Co. v. P. B. & W. Railroad Co.*, 20 I. C. C. 124. But beyond that neither the Railroads nor the Commission was authorized to go.

It must be borne in mind that the Railroads did not and never had owned the Stock Yards' private side track or the land on which it was laid, had no ownership or interest in the Stock Yards, and throughout had dealt with the Stock Yards at arms' length. Compare *Morgan Run Railway Co. v. Public Utilities Commission*, 98 Oh. St. 218; *Barlotti v. Public Utilities Commission*, 103 Oh. St. 647. This case is therefore entirely different from a case where the owner of the private property has *not* specified the terms of the railroad's use of his property in a revocable agreement of which all parties in interest had notice. Compare *Roberts v. Northern Pacific Railroad Co.*, 158 U. S. 1; *Northern Pacific Railroad Co. v. Smith*, 171 U. S. 260; *Coe v. The Columbus, Piqua and Indiana Railroad Co.*, 10 Oh. St. 372, 411; *Goodin v. Cincinnati and Whitewater Canal Co.*, 18 Oh. St. 169; *Pennsylvania Co. v. Platt*, 47 Oh. St. 366, 385.

The Commission did not deny that the Stock Yards could exercise the power of termination which the Stock Yards reserved in the 1935 side track agreement. The appellants are content only to question the Stock Yards' right to do so. But both the Commission and the appellants seem to assume that at least as long as the Stock Yards makes its private side track available at all, the Commission is authorized to compel the Stock Yards to make it available for the delivery of livestock, notwithstanding the contrary provisions of the side track agreement. The

basis of this authority is said to be the "common carrier status" of the side track. The "common carrier status" of the side track is said to result from the limited devotion to public use which the Stock Yards permitted after 1935. The Commission did not state whether it thought that the devotion to public use for the delivery of livestock came about because the Stock Yards had somehow impliedly agreed to such use contrary to its express limitation, or because the Stock Yards was estopped to deny that the side track had been devoted to such use.

But the Commission's conclusion is fallacious, whether it proceeded on the theory of estoppel or implied agreement. Swift and the other plants served in the past had full knowledge of the Stock Yards' ownership and control of its side track. There is no evidence that the Stock Yards represented or held out to anyone that its private side-track was open to public use for the delivery of livestock or even to any use at all except on such terms as the Stock Yards chose to impose. The District Court expressly found that "there is no evidence that the Stock Yards has ever acquiesced in any use of its land or said side track by the Railroad or Swift & Company, except under the provisions of the side track agreement." R. 184. Certainly the Stock Yards cannot be said to be barred by any implied agreement, or estopped by any conduct on its part, from withdrawing all right to use the side track or from limiting its future use. How, then, has its side track been devoted to a public use for the delivery of livestock?

Even if it be assumed that until 1935 the Stock Yards had permitted unrestricted use of its side track and that the side track had therefore been devoted to unrestricted public use up to that time, it does not follow that the Stock Yards was powerless thereafter to limit use of the side track by declining to permit the delivery of livestock. The Railroads know of no authority (compare *Rodefer v. Pittsburgh, etc. Railroad Co.*, 72 Oh. St. 272; *Toledo v.*

Public Utilities Commission, 135 Oh. St. 57), and the appellants point to no authority which is not clearly distinguishable, which would deny the Stock Yards the right in 1935 to withhold all use of its private side track. For the purposes of this case and this question, the Stock Yards was no different than a private industry and as such was not required by statute to obtain the permission of anyone before it could grant or withhold public use of its property. When the Stock Yards withdrew permission to deliver livestock, it withdrew the permission as to everyone. There was no discrimination in the withdrawal.

In short, if there was devotion to public use it was by reason of and was measured by the side track agreements. Hence, even on the assumption that prior to 1935 the Stock Yards had permitted its side track to be devoted to a public use with respect to the delivery of all commodities, it does not follow that the Stock Yards had lost the right to withhold the devotion of its side track to public use for the delivery of livestock, by the 1935 side track agreement. "It is plain that a carrier's holding out and actual performance may be limited to a few articles only. That is to say, he may be a common carrier only of a restricted number of commodities." *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 483.

Even a common carrier is not required to make deliveries or render services beyond the scope of its holding out or representations to the public. "In order to be held liable as a common carrier, the goods in question must be such as he professes to carry. In other words, a common carrier may hold itself out to the public as being a carrier of specified articles only and if it is only engaged in the carriage of such articles it is under no obligation to carry other things." *State v. Rosenstein*, 217 Iowa, 985. See also, *Chicago, etc. Railway Co. v. Wallace*, 66 Fed. 506; *Kuter v. Michigan Central Railway Co.*, 14 Fed. Cas. 884; *Louisville, etc. Railway Co. v. Higdon*, 149 Ky. 321; *Camp-*

bell v. Storage and Van Co., 187 Mo. App. 565; Alabama, etc. Railway Co. v. Herring, 234 Ala., 238; Collier v. Langan, etc. Moving Co., 147 Mo. App. 435; Craig v. Public Utilities Commission, 115 Oh. St. 512; Collins v. Craig Shipbuilding Co., 7 C. C. N. S. (Ohio) 350; Michie, Carriers, Volume 1, Section 362.

The right of a private industry to limit the extent to which its private property is devoted to a public use cannot be less than the right of a common carrier to limit the extent to which it serves the public. It is therefore not a matter of all or none as the appellants suggest. So long as the Stock Yards does not represent or hold out that its private side track can be used for the delivery of livestock, its private side track, to that extent, has not been devoted to a public purpose with a resulting "common carrier status." And this is so, even on the erroneous assumption that to the extent of the use the Stock Yards permitted for other purposes its side track may have been devoted to a public use and therefore acquired a "common carrier status."

One of the fallacies inherent in the Commission's conclusion and order is strikingly apparent in the facts of this case. The Commission's order makes no provision for the event that the Stock Yards may terminate the side track agreement. In that event, the Railroads would be left in an impossible position. Confronted with the alternative of using the Stock Yards' private side track, which by hypothesis is impossible, or of acquiring a right of way (whether by agreement, purchase or condemnation) from the New York Central's main line to Swift's private side track, which the Commission had no authority to require, the Railroads must risk heavy penalties for violation of the Commission's order, or liability to the Stock Yards for invasion of private property rights in compliance with the order.

C. Section 2 of The Elkins Act Does Not Enlarge The Constitutional or Statutory Authority of the Commission.

"So far as relevant here, Section 2 of the Elkins Act provides in effect that in any proceeding before the Commission for the enforcement of the provisions of the Interstate Commerce Act "it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers." 49 U. S. C. 42.

It is not clear from the report of the Commission precisely what authority it believed that this section gave it with respect to its order against the Railroads or the effect, as to the Stock Yards, of its conclusion about the "common carrier status" of the Stock Yards' private side track. Thus; it is not clear whether the Commission believed it would have had the authority to make the order it did in the absence of Section 2 of the Elkins Act and the presence of the Stock Yards in the proceeding before the Commission. It is clear that Section 2 of the Elkins Act did not enlarge the definition of "railroad" in Section 1(3)(a), the prohibitions of Sections 1(6) and 3(1), or the duties imposed on the Railroads by Section 1(9) of the Interstate Commerce Act.

Section 2 carries its own refutation of any contention to the contrary in the provision granting the Commission authority only "to the same extent, and subject to the same provisions, as are or shall be authorized by law with respect to carriers." There is no basis in the legislative history or in the decisions cited by the appellants for supposing that Congress intended Section 2 of the Elkins Act to be a charter of authority to the Commission beyond the powers

given to it by other statutes relating to interstate commerce or in contravention of the Constitution.

III. THE COMMISSION FAILED TO MAKE BASIC OR ESSENTIAL FINDINGS REQUIRED BY THE ACT TO SUPPORT ITS ORDER, FAILED TO DISPOSE OF ISSUES PRESENTED, AND MADE AN ORDER WHICH IS WHOLLY INADEQUATE.

The fundamental difficulty in this entire proceeding stems from the Commission's attempt to adjudicate what is essentially a controversy between Swift and the Stock Yards and dispose of that controversy by an order against the Railroads. In that process, the Commission was brought face to face with the private side track agreement between the Stock Yards and the New York Central. The Commission sought to avoid its effect by determining that the side track had been devoted to a public use, had a "common carrier status," and was therefore a part of the New York Central's "railroad." Having thus improvised a basis for its jurisdiction, the Commission then determined that in not delivering livestock to Swift, the Railroads had been guilty of undue prejudice (Section 3(1)), an unreasonable practice (Section 1(6)), and failure to operate a switch connection (Section 1(9)). This, in short compass, was the foundation on which the Commission rested its order requiring the Railroads to deliver livestock to Swift over the private side track of the Stock Yards.

A. The Commission Failed to Make the Basic or Essential Findings Required by the Act to Support its Order.

To hold that the Railroads have been guilty of an "unreasonable practice," "undue prejudice and preference," and "failure to operate a switch connection" is merely to say in the words of the Act that the Railroads have violated Sections 1(6), 3(1) and 1(9). In the words of this Court, "such a conclusion would not only require evidence to support it but findings of appropriate definiteness to ex-

press it." *Florida v. United States*, 282 U. S. 194, 208. This Court has held "that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. * * * In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit." *United States v. Chicago etc. Railroad Co.*, 294 U. S. 499, 504-505.

To find that the Railroads had violated Sections 1(6) and 3(1) of the Act, the Commission was required by those sections first to find the basic underlying facts requisite to disclose that failure to deliver livestock to Swift's private side track over the private side track of the Stock Yards constituted an "unreasonable practice," an "undue prejudice" to Swift, and an "undue preference" to Swift's competitors. So also with respect to the violation of Section 1(9) of the Act, the Commission was required to find, among other things, the basic underlying facts necessary to disclose that operation of the switch connection would provide the New York Central "reasonable compensation" and that the switch connection could be operated upon "reasonable terms." Merely to state the conclusion is not to establish the fact.

In failing to find that cost to the Railroads of making deliveries of livestock to Swift over the Stock Yards' private side tracks, the Commission wholly omitted to find the quasi-jurisdictional facts required by the Act to sustain its findings of violations of Sections 1(6), 1(9) and 3(1). Without a finding as to whether or not the Railroads were obliged to pay the Stock Yards for the privilege of making deliveries of livestock over its private side track, the Commission could not possibly determine the cost to the Railroads of making such deliveries. Without a finding as to the cost to the Railroads of making such deliveries, the Commission could not possibly determine whether or not

the Railroads' failure to make such deliveries constituted an *unreasonable* practice, an *undue* prejudice to Swift, or an *undue* preference to Swift's competitors. Nor could the Commission find that the Railroads could operate the switch connection upon *reasonable* terms and that operation of the switch connection would insure *reasonable* compensation to the Railroads. The only evidence relating to the cost of using the private side track was to the effect that the Stock Yards would permit such use upon the payment to it of six to nine dollars per car. But the Commission did not find as a fact that this charge of six to nine dollars per car, or any other figure, constituted or would constitute the cost to the Railroads of delivering livestock to Swift, or that such delivery could be effected without cost.

The failure of the Commission to make the requisite finding on this aspect of the case was not inadvertent nor is it difficult to understand. Confronted with the private side track agreement between the Stock Yards and the New York Central, the Commission was unable to extricate itself from the following dilemma. Admitting for the sake of the argument, that the side track may have become a part of the New York Central's "railroad" and that the Railroads had the right to deliver livestock over it, what were the terms and conditions of the right? The Commission could not find as a fact that such deliveries could be made without compensation to the Stock Yards. This would have been in direct violation of the contract.* The Commission could

* As the Railroads have shown earlier in this brief, the private side track agreement was the sole measure of the New York Central's right to use the side track. Nothing in the Act prohibited the Stock Yards (a private industry for the purposes of this case) from declining to grant any rights at all, or authorized the Commission to compel the Stock Yards, in 1899, in 1924, in 1935, or now, to grant more rights than it chose. This is therefore a problem totally different from the problem which would be presented if Congress had constitutionally empowered the Commission to fix the terms upon which a private industry must permit a railroad to use its property. Compare *Louisville, etc. Railroad Co., v. Mottley*, 219 U. S. 467.

not find that the compensation was to be measured by the demands of the Stock Yards because the Railroads had not agreed to such demands. The Commission has no power to order an appropriation of private property, and it carefully refrained from proceeding against the Stock Yards as a carrier. In consequence, the Commission was devoid of power to establish any compensation. Faced with this situation, the Commission made no finding of fact but contented itself with the expression of two conflicting opinions: "that the Stock Yards could not lawfully collect, or the Railroad pay, either yardage charges or any other amount of special compensation" but that "the Stock Yards is, of course, entitled to reasonable compensation for the use of its track." (R. 40.)

The failure of the Commission to make the vital finding concerning the cost to the Railroads of providing the service required by the Commission's order constitutes a fatal defect with respect to each of the violations of the Act which the Commission purported to find. ". . . the defect is not merely one of the absence of a 'suitably complete statement' of the reasons for the decision; it is the 'lack of the basic or essential findings required to support the Commission's order.'" *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 489. In the end, "we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency." *United States v. Chicago, etc. Railroad Co.*, 294 U. S. 499, 511.

B. The Commission Failed to Dispose of the Issues Presented and Made an Inadequate Order.

It is apparent from the foregoing analysis that the Commission's report and order provide a formula for confusion. The Commission either explicitly or implicitly left open the following questions: Can the Stock Yards terminate the side track agreement and thereby prevent the Railroads from complying with the order? If the Railroads

deliver livestock to Swift over the Stock Yards' side track, upon what terms must the Stock Yards make it available? Is the Stock Yards entitled to compensation for use of its side track? If so, from whom and upon what basis? If the Railroads must pay for use of the side track, must they absorb the charges or can they pass them on to Swift?

Assuming for the argument that the Commission was authorized in this case to make an order, the administrative process is no more vindicated by the Commission's failure to frame an order adequate to dispose of the case than by a lack of clarity in its exercise. *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 197; compare *Securities and Exchange Commission v. Chenery Corp.*, 318 U. S. 80. Only by explicitly determining the questions left open and making an order appropriate to dispose of them could the Commission have avoided needless litigation, and insured that the object of the order, direct delivery of livestock to Swift's side track, could be promptly and fully achieved.

As this Court concisely stated on another occasion: "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States v. Chicago, etc. Railroad Co.*, 294 U. S. 499, 511.

CONCLUSION.

The Commission attempted to adjudicate a controversy between Swift and the Stock Yards by an order directed against the Railroads. In effect that order required the Railroads to deliver livestock to Swift's private side track, either (1) by acquiring a right of way and constructing a track from the New York Central's main line to Swift's private side track, or (2) by making the deliveries over the private side track of the Stock Yards. Resort to the first alternative is a requirement which the Commission lacked statutory authority to impose. Resort to the second alternative is precluded by the private side

track agreement, executed by the Stock Yards and the New York Central in 1935. In consequence, the District Court correctly held that the Commission exceeded its authority, and that enforcement of its order should be enjoined. The judgment should be affirmed.

Respectfully submitted,

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APPENDIX.

Interstate Commerce Act, as Amended (49 U. S. C. 1 et seq.)

SECTION 1(3)(a). * * * The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property * * *.

SECTION 1(6). It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

SECTION 1(9). Any common carrier subject to the provisions of this chapter, upon application of any lateral,

branch line of railroad, or of any shipper tendering inter-state traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch line railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the commission, as provided in section 13 of this chapter, and the commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the commission may make an order, as provided in section 15 of this chapter, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the commission, other than orders for the payment of money.

SECTION 3(1). It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular descrip-

tion of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 2, Elkins Act (49 U. S. C. 42).

In any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceeding be instituted before the Interstate Commerce Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.